

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

TIMOTHY CRAIG HAITHCOX,

Plaintiff,

vs.

LEO DUTTON, ERIC GILBERTSON,
ALAN HUGHES, DAN O'MALLEY,
WILLIAM PANUS, and ARLEEN
HIBBARD,

Defendants.

CV 16-00059-H-DLC-JTJ

FINDINGS AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE JUDGE

Plaintiff Timothy Haithcox, a prisoner proceeding in forma pauperis and without counsel, filed a Complaint pursuant to 42 U.S.C. § 1983. The Court initially construed Mr. Haithcox's Complaint as allegations that Defendants violated his constitutional rights by failing to preserve evidence in his criminal case. Because any such finding on this issue would necessarily imply the invalidity of Mr. Haithcox's conviction, the Court recommended that this matter be dismissed based on the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994). (Doc. 13.) Mr. Haithcox filed objections to the Findings and Recommendations clarifying that he was not attempting to attack the validity of his criminal conviction but he was claiming that his rights were violated based on

the handling of his backpack. (Doc. 14.) Judge Christensen rejected the Findings and Recommendations on the presumption that Mr. Haithcox was attempting to bring a claim for deprivation of property or for illegal search and seizure. The matter was referred back to this Court for further review. (Doc. 16.)

After conducting an additional screening of Mr. Haithcox's filings, this Court agreed that the only potential claims alleged were a deprivation of property claim under the Fourteenth Amendment due process clause and/or an unlawful search and seizure claim under the Fourth Amendment. The Court found that as currently plead, Mr. Haithcox's allegations failed to state any such claim and were subject to dismissal. (Doc. 19.) Mr. Haithcox was given a number of opportunities to amend his filings but after numerous extensions he has failed to do so. (Docs. 21, 26.)

Accordingly, for the reasons set forth in the Court's Order dated October 4, 2017 (Doc. 19), the Court finds that Mr. Haithcox has failed to state a federal claim upon which relief may be granted and therefore issues the following:

RECOMMENDATIONS

1. This matter should be DISMISSED for failure to state a federal claim.
2. The Clerk of Court should be directed to close this matter and enter judgment in favor of Defendants pursuant to Rule 58 of the Federal Rules of Civil

Procedure.

3. The Clerk of Court should be directed to have the docket reflect that the Court certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith. No reasonable person could suppose an appeal would have merit. The record makes plain the Complaint lacks arguable substance in law or fact.

4. The Clerk of Court should be directed to have the docket reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g) because Mr. Haithcox failed to state a claim upon which relief may be granted.

**NOTICE OF RIGHT TO OBJECT TO FINDINGS &
RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT**

Mr. Haithcox may file objections to these Findings and Recommendations within fourteen (14) days after service (mailing) hereof.¹ 28 U.S.C. § 636. Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

This order is not immediately appealable to the Ninth Circuit Court of

¹Rule 6(d) of the Federal Rules of Civil Procedure provides that “[w]hen a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail) . . . 3 days are added after the period would otherwise expire under Rule 6(a).” Therefore, since Mr. Haithcox is being served by mail, he is entitled an additional three (3) days after the period would otherwise expire.

Appeals. Any notice of appeal pursuant to Fed.R.App.P. 4(a), should not be filed until entry of the District Court's final judgment.

DATED this 9th day of April, 2018.

/s/ John Johnston
John Johnston
United States Magistrate Judge